Ranjit Singh a/l Gurnam Singh (suing on behalf of himself and 79 members of the Bougainvillea Country Club, Ipoh) v Dato Goh Cheng Hong & Ors and another suit

HIGH COURT (IPOH) — CIVIL SUIT NO 22NCVC-227–10 OF 2011 AND 22NCVC-227–10 OF 2011
CHE MOHD RUZIMA JC
6 JANUARY 2015

Unincorporated Associations — Clubs — Fiduciary duty — Whether promoter of club owed club members fiduciary duty not to take business decision that adversely affected their interests — Promoter was majority shareholder and director of companies that owned and operated club and owned land on which club stood — Promoter as 'directing mind and will' of companies sold land to third party which barred members from further entry to land and club — Whether promoter's decision without notice to club's members or regard for their interest made him personally liable for exemplary damages for breach of fiduciary duties — Whether companies (including buyer of land) and promoter also liable for tort of conspiracy to injure club members' interests and tort of inducing breach of members' contracts with club's owner

The first defendant ('D1') and his wife were the majority and controlling shareholders of the second and third defendants ('D2' and 'D3'). At all material times, D1 and his brother were directors of D2 while D1 and his brother in law were directors of D3. D1 founded and promoted a country club ('BCC'), with various sports and recreational facilities owned by D2. The plaintiff, who represented 79 other members of BCC in this action, was one of the many who signed agreements with D2 to become members of the club by paying an entrance fee of RM10,000 and a security deposit of RM500. BCC was situated on land ('the land') belonging to D3 which was leased to D2 for 30 years. In consideration for the grant of banking facilities to D2, the latter executed a debenture over its assets to the bank. The facilities were also secured by a third-party charge over the land and by personal guarantees by D3's directors. When D2 defaulted under the facilities, the bank appointed receivers and managers over D2. Subsequently, negotiations between D3 (acting through D1), the bank, the receivers and managers, and the fourth defendant ('D4') as an interested buyer resulted in D4 buying the land from D3 for RM7.5m which figure fully settled the debts to the bank and extinguished the personal liabilities of the guarantors. D4, as the new owner of the land, informed members of BCC that they could no longer enter the land or use the facilities at the club. The club members' efforts to contact D1 and the directors of D2 about the future of BCC and their membership status were unsuccessful.

Letters of demand from the plaintiff's solicitors to D2, D3 and D4 were not replied. D2 was eventually wound up. In the instant action, the plaintiff, claimed, inter alia, damages against D1 for breach of his fiduciary duties as well as for the tort of conspiracy to injure the interests of BCC's members (in acting together with D2 and D3) and for the tort of inducing a breach of the membership contracts between BCC members and D2 (in acting together with D4). The plaintiff said D1's actions nullified the membership agreements, caused the members to lose the fees and deposits they had paid and deprived them of continued use of BCC's facilities. As against D3 and D4, the plaintiff claimed damages for inducing a breach of the membership contracts with D2. The plaintiff contended that at all material times BCC members were kept in the dark about D2's debenture and the plans to sell the land; that, even after receivers and managers were appointed, D1 continued to assure BCC's members that their membership would not be affected and that the club would continue to function as normal. In their defence, D1 and D3 contended, inter alia, that the sale of the land was the decision of the receivers and managers while D4 said it was not liable for any loss or damage as it bought the land as a bona fide buyer without notice of any dispute between the plaintiff, the members he represented and the other defendants. D4 also said it had no obligation or duty of care towards the plaintiff or any of the members he represented as it had no privity of contract with them.

Held:

(1) Since the plaintiff and the 79 members he represented had been given back their initial membership fees and deposits, they were no longer eligible to claim for loss of use of the club's facilities (see para 39(a)).

(2) As the evidence showed D1 was the founder and promoter of BCC, the directing mind and will of D2 and D3 and that he owed fiduciary duties to BCC members, his breach of those duties and acting in conflict of interest made him liable for exemplary damages to the plaintiff and the 79 members he represented. As the directing mind and will of D2 and D3 at the time those companies made the decisions regarding the bank loan, the granting of the debenture, the creation of the lease on the land, the offer for sale of BCC's membership to the public and the sale of the land to D4, D1 had to be careful when he made his business decisions that the interests of members of BCC were not adversely affected. A promoter of a club owed fiduciary duties to its members and the plaintiff had successfully proved D1 had breached those duties (see paras 24, 28 & 39(b)).

(3) It was just and equitable to find D1, D2 and D3 liable under the tort of conspiracy to injure and to compensate the plaintiff and the 79 members he represented for their losses. Contrary to D1's evidence that the land was purportedly sold by the receivers, the court found the only power the

receivers had was to surrender the lease or assign the remainder of the lease or sell the building and other movable assets of D2 on the land. The land on which BCC stood did not belong to D2 but to D3 and only D3 had power to sell the land. The negotiations and dealings for the sale of the land to settle the debt to the bank were kept secret by D1, D2 and D3 from members of BCC. They ignored the interests of BCC members and were only interested in escaping liability as borrower and guarantor. As a result, BCC members were deprived of their membership benefits and privileges. They lost their entrance and security fees, they could not sell their membership to third parties (which the rules of the club allowed), they lost their security of tenure of membership till June 2056 and they could no longer gain access to the clubhouse to enjoy the facilities provided (see paras 30–33).

(4) D1, D3 and D4 directly interfered with and induced a breach of the membership agreements between D2 and BCC members causing the latter to suffer loss and damages. They knew about the said agreements but they gave priority to protecting their interests and were careless about the damage or loss suffered by BCC's members. The intention to interfere with the membership agreements could be inferred from the defendants' action (see para 38).

[Bahasa Malaysia summary

Defendan pertama ('D1') dan isterinya merupakan pemegang saham majoriti dan mengawal defendan kedua dan ketiga ('D2' dan 'D3'). Pada semua masa material, D1 dan abangnya merupakan pengarah kepada D2 manakala D1 dan abang iparnya adalah pengarah kepada D3. D1 ditubuhkan dan dipromosikan sebagai sebuah kelab desa ('KD'), dengan pelbagai kemudahan sukan dan rekreasi yang dimiliki oleh D2. Plaintif yang mewakili 79 ahli-ahli KD dalam tindakan ini, adalah salah seorang yang menandatangani perjanjian dengan D2 untuk menjadi ahli kelab tersebut dengan membayar yuran kemasukan sebanyak RM10,000 dan deposit jaminan sebanyak RM500. KD tersebut terletak di atas tanah ('tanah tersebut') yang dimiliki oleh D3 dan dipajak kepada D2 selama 30 tahun. Sebagai balasan untuk pemberian kemudahan perbankan kepada D2, D2 melaksanakan satu debentur ke atas asetnya kepada bank. Kemudahan ini juga telah dicagar oleh gadaian pihak ketiga ke atas tanah tersebut dan melalui jaminan peribadi oleh pengarah D3. Apabila D2 mungkir di bawah kemudahan tersebut, bank melantik penerima dan pengurus terhadap D2. Sehubungan dengan itu, rundingan antara D3 (bertindak melalui D1), bank, penerima dan pengurus, dan defendan keempat ('D4') sebagai pembeli berminat mengakibatkan D4 membeli tanah daripada D3 untuk RM7.5 juta, di mana jumlah tersebut menyelesaikan sepenuhnya hutang-hutang kepada bank dan memadamkan liabiliti peribadi penjamin-penjamin. D4, sebagai pemilik baru tanah tersebut, memaklumkan ahli-ahli KD bahawa mereka tidak boleh lagi memasuki tanah tersebut atau

menggunakan kemudahan di kelab itu. Usaha ahli-ahli kelab untuk menghubungi D1 dan pengarah D2 mengenai masa depan KD dan status keahlian mereka tidak berjaya. Surat tuntutan daripada peguam cara plaintif kepada D2, D3 dan D4 tidak berjawab. D2 akhirnya dibubarkan. Dalam tindakan ini, plaintif mendakwa, antara lainnya, ganti rugi terhadap D1 kerana melanggar kewajipan fidusiarinya begitu juga untuk tort konspirasi untuk mencederakan kepentingan ahli-ahli KD (yang bertindak bersama-sama dengan D2 dan D3) dan untuk tort yang mendorong pelanggaran kontrak keahlian di antara ahli-ahli KD dan D2 (yang bertindak bersama-sama dengan D4). Plaintif mengatakan tindakan D1 yang membatalkan perjanjian keahlian, menyebabkan ahli-ahli kehilangan yuran dan deposit yang dibayar oleh mereka dan menghalang mereka dari terus menggunakan kemudahan KD tersebut. Bagi melawan D3 dan D4, plaintif menuntut ganti rugi kerana mendorong pelanggaran kontrak keahlian dengan D2. Plaintif menegaskan bahawa pada semua masa yang material ahli KD tidak diberitahu mengenai debentur D2 dan merancang untuk menjual tanah tersebut; bahawa, walaupun selepas penerima dan pengurus dilantik, D1 berterusan meyakinkan ahli-ahli KD bahawa keahlian mereka tidak akan terjejas dan bahawa kelab tersebut akan terus berfungsi seperti biasa. Dalam pembelaan mereka, D1 dan D3 menghujah, antara lain, bahawa penjualan tanah tersebut merupakan keputusan penerima dan pengurus manakala D4 mengatakan bahawa ia tidak bertanggungan untuk apa-apa kehilangan atau kerugian memandangkan ia membeli tanah tersebut sebagai pembeli suci hati tanpa dimaklumkan tentang apa-apa pertikaian di antara plaintif, ahli-ahli yang diwakilinya dan defendan-defendan lain. D4 juga mengatakan ia tidak mempunyai obligasi atau kewajipan menjaga terhadap plaintif atau mana-mana ahli yang diwakilinya kerana ia tidak mempunyai priviti kontrak dengan mereka.

Diputuskan:

(1) Memandangkan plaintif dan 79 ahli yang diwakilinya telah dikembalikan yuran keahlian permulaan mereka dan deposit, mereka tidak lagi layak untuk menuntut untuk kehilangan penggunaan kemudahan kelab (lihat perenggan 39(a)).

(2) Memandangkan keterangan menunjukkan D1 merupakan pengasas dan penganjur KD, minda mengarah dan kehendak kepada D2 dan D3 dan bahawa dia mempunyai kewajipan fidusiari kepada ahli-ahli KD, pelanggaran tugas olehnya dan bertindak dalam konflik kepentingan membuatkannya bertanggungan untuk ganti rugi teladan kepada plaintif dan 79 ahli yang diwakilinya. Sebagai minda mengarah dan kehendak kepada D2 dan D3 pada masa di mana syarikat-syarikat tersebut membuat keputusan berhubung pinjaman bank, pemberian debentur itu, penciptaan pajakan ke atas tanah tersebut, tawaran untuk penjualan keahlian KD kepada orang awam dan penjualan tanah tersebut kepada D4, D1 perlu berhati-hati apabila dia membuat keputusan

perniagaannya yang dengan itu tidak menjejaskan kepentingan ahli-ahli KD. Seorang penaja kelab mempunyai kewajipan fidusiari kepada ahli-ahlinya dan plaintif telah berjaya membuktikan D1 telah melanggar tugas tersebut (lihat perenggan 24, 28 & 39(b)).

(3) Adalah adil dan saksama untuk mendapati D1, D2 dan D3 bertanggungan di bawah tort konspirasi untuk mencederakan dan untuk membayar pampasan kepada plaintif dan 79 ahli yang diwakilinya untuk kerugian mereka. Bertentangan dengan bukti D1 bahawa tanah tersebut kononnya dijual oleh penerima, mahkamah mendapati penerima hanya mempunyai kuasa untuk menyerahkan pajakan atau menyerah hak baki pajakan atau menjual bangunan dan aset boleh alih D2 yang lain di atas tanah itu. Tanah di mana KD tersebut didirikan bukanlah kepunyaan D2 tetapi untuk D3 dan hanya D3 mempunyai kuasa untuk menjual tanah tersebut. Rundingan dan urusan penjualan tanah untuk menyelesaikan hutang kepada bank telah dirahsiakan oleh D1, D2 dan D3 daripada ahli-ahli KD. Mereka mengabaikan kepentingan ahli-ahli KD dan hanya berminat untuk melarikan diri daripada liabiliti sebagai peminjam dan penjamin. Akibatnya, ahli-ahli KD telah dilucutkan faedah keahlian dan keistimewaan mereka. Mereka kehilangan yuran kemasukan dan deposit mereka, mereka tidak boleh menjual keahlian mereka kepada pihak ketiga (peraturan yang dibenarkan kelab), mereka kehilangan jaminan tempoh keahlian mereka sehingga Jun 2056 dan mereka tidak lagi boleh memasuki rumah kelab untuk menikmati kemudahan yang disediakan (lihat perenggan 30–33).

(4) D1, D3 dan D4 campurtangan secara langsung dan menyebabkan pelanggaran perjanjian keahlian di antara D2 dan ahli-ahli KD menyebabkan ahli-ahli KD mengalami kerugian dan kerosakan. Mereka tahu mengenai perjanjian tersebut tetapi mereka memberi keutamaan untuk melindungi kepentingan mereka dan cuai tentang kerosakan atau kerugian yang dialami oleh ahli-ahli KD. Niat untuk campurtangan dengan perjanjian keahlian boleh diandaikan daripada tindakan defendan-defendan (lihat perenggan 38).]]]]]

Notes

For cases on clubs in general, see 12(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3204–3206.

Cases referred to

Abdul Aziz bin Atan & 87 Ors v Ladang Rengo Malay Estate Sdn Bhd [1985] 2 MLJ 165 (refd)

Aron Salomon (Pauper) v A Salomon & Co Ltd [1897] AC 22 (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor [1988] 1 MLJ 97, SC (refd)
Bank Bumiputra (M) Bhd & Anor v Lorraine Esme Osman & Aspatra Sdn Bhd & Ors [1985] 1 CLJ 552, HC (refd)
Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62, CA (refd)
Lennards's Carrying Company Ltd v Asiatic Petroleum Company Ltd [1915] AC 705, HL (refd)
Fong Seng Fatt dan satu lagi lwn Syarikat Cekal Kasih Sdn Bhd [2011] 4 MLJ 27, CA (refd)
Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor [1980] 1 MLJ 109 (refd)
Joseph Paulus Lantip & Ors v Unilever Pic [2012] 7 CLJ 693, FC (refd)
Law Kam Loy and Anor v Boltex Sdn Bhd and Ors [2005] MLJU 225; [2005] 3 CLJ 355, CA (refd)
Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105, FC (refd)
Ong & Co Pte Ltd v Quah Kay Tee [1996] 2 SLR 553, HC (refd)
Prest v Petrodel Resources Ltd and others [2013] 3 WLR 1, SC (refd)
R Balakrishna Pillai v State (1996) CRi LJ 757, HC (refd)
Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor [1996] 3 MLJ 533, FC (refd)
Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and Other Appeals [1996] 2 MLJ 265, CA (refd)

Legislation referred to

Companies Act 1965 s 6A
Evidence Act 1950 ss 10, 91

Rabinder Singh (Rabin & Assoc) for the plaintiff.
Augustine Anthony (Terrence with him) (Gibb & Co) for the first and third defendants.
Collin Goonting (Collin Goonting & Assoc) for the fourth defendant.

Che Mohd Ruzima JC:

INTRODUCTION

[1] Plaintiff brought a representative action suing the defendants on his own behalf and on behalf of 79 others. He and 79 others were at all material times members of Bougainvillea Country Club ('BCC'), Ipoh. They signed individual membership agreements with the second defendant which will expire on 26 June 2056 for the purpose of recreation and relaxation for themselves and their families and paid RM10,000 entrance fee and security deposit of RM500. They enjoyed the privilege of being the members of BCC but the enjoyment was short lived when the second defendant was placed

under receivership and thereafter wound up. The land where the BCC's clubhouse was erected being sold to the fourth defendant and they are no longer allowed to use the facilities at the clubhouse. The plaintiff pursues this action against the first, third and fourth defendants to claim damages for the loss suffered. The court found that the plaintiff had on balance of probability proven his case against the first, third and fourth defendants allowed the plaintiffs claim for damages. The first and third defendants, and fourth defendant failed on separate appeals, but for the purpose of writing the grounds of decision a single ground that cover both the appeals is sufficient.

THE REPRESENTATIVE ACTION

[2] There are two interlocutory applications to strike out plaintiff's suit based on the issue of the plaintiff's locus standi to bring a representative action. On 5 June 2012 the fourth defendant filed an application (encl 17) to strike out the plaintiff's suit on the ground alleging that the plaintiff did not have locus standi to commence a representative action. Then, on 10 December 2012 the first and third defendants filed another application (in encl 25) to obtain the names of the other 79 members that the plaintiff represents in this suit and also alleging that the plaintiff had no locus standi to commence this suit in representative capacity. On 21 March 2013 the court dismissed both applications with costs.

[3] The first and third defendants thereafter appealed to the Court of Appeal in respect of the High Court's decision and on 4 October 2013 the Court of Appeal dismissed the appeal with costs. The plaintiff's counsel submitted and I agree that with the decision of the Court of Appeal dismissing the first and third defendants' appeal, the issue of the plaintiff's locus standi to bring a representative action on behalf of himself and the other 79 members he represents is settled and cannot be raised again. The Supreme Court's case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 and the Federal Court case of *Joseph Paulus Lantip & Ors v Unilever Pic* [2012] 7 CLJ 693 on law of res judicata were referred and followed.

THE FACTS

[4] It will be necessary to set out in some detail the events that happened leading up to the present claim by the plaintiff so as to enable the better understanding of the issues at stake. The facts of the case have been comprehensively set out in the written submissions by learned counsel for the plaintiff, indicating the related documents referred to in the bundles of documents, documents produced in the court's exhibits or the witnesses' evidences in court. So, I reproduced the said brief facts from the plaintiff's submissions as follow:

Facts		Document
4.1	The plaintiff was at all material times a member of Bougainvillea Country Club, Ipoh (hereinafter referred to as 'the said club') of whom the second defendant was at all material times the proprietor and operator. The plaintiff brings this suit on own behalf of himself and in representative capacity on behalf of 79 other members of the said club as they entered into similar standard term agreements with the second defendant, have a common grievance, in that, they lost their membership as a result of the sale of the said land by the third defendant (acting by the first defendant) to the fourth defendant.	
4.2	The first defendant and his wife are majority shareholders of the third defendant holding 90% of its shares, and the first defendant is also a director of the third defendant. As the documentary evidence clearly shows, the third defendant was described at all material times a key promoter of the said club ie to recruit members for the said club, (as the agreement of the plaintiff with the second defendant shows). The club is defined at p 141(16) of Bundle B as Bougainvillea Country Club Ipoh distinct from the company which is described as the company.	pp 42–45 of Bundle B, at p 45 p 44 p 141 (23) of Bundle B p 141 (16) of Bundle B
4.3	The second defendant, Bougainvillea Country Club Bhd was at material times a leaseholder of the plot of land PN 268489 Lot 228760 Mukim Hulu Kinta situated at No. 82, Hala Bercham Timur 11, Bercham Height, Ipoh (formerly PT 138865, HS(D) KA 48297, and hereinafter referred to as 'the said land'), holding a lease of 30 years from 1 July 1996 to 30 June 2026. (hereinafter referred to as 'the said lease').	pp 4–5 of Bundle B

4.4	The third defendant was at all material times the registered owner of the said land since April 1996 and who leased it out to the second defendant for 30 years as above.	pp 4–5 of Bundle B
4.5	Arab-Malaysian Bank Bhd (now known as Am Islamic Bank Bhd and hereinafter referred to as 'the said bank') gave banking facilities to the second defendant and the second defendant granted a debenture deed dated 21 June 1996 to the said bank which was a fixed and floating charge over all the assets and undertakings of the second defendant. In addition the bank also took a third party charge over the said land of the third defendant and the directors of the third defendant inclusive of the first defendant gave personal guarantees.	
	(i) The said charge document is at pp 109–134 in Bundle G. The said charge document was signed by the first defendant as one of the signatories and the endorsement as borrower and lessee was also signed by the first defendant as one of the signatories (as he was director of both companies at that material time).	pp 110 of Bundle G, pp 134 of Bundle G.
	(ii) This court is referred to the debenture granted by the second defendant to the said Bank on 21 June 1996 ie before the date of the offer letter dated 19 September 1996 above for banking OD facility of RM4m and term loan of RM14m. The said debenture was also signed by the first defendant as one of the directors of the second defendant	pp 60–82 of Bundle G p 81 of Bundle G

4.6	A brochure was initially issued by the second defendant to promote recruitment of members for the said club which showed a clubhouse which was to be built on the said land with facilities for recreation, inter alia, a gymnasium, sauna, swimming pool, badminton courts and cafeteria etc. According to SP1 and SP2, in evidence in chief they stated that they met the first defendant at his office at No 250–252 Jalan Bercham, Medan Bercham together with a sales person and were given the brochure and the first defendant gave a very rosy picture of the said club prior to handing over the brochure. Some of the members (SP3 and SP5) received the brochures through other authorised agents of the second defendant.	pp 1–17 of Bundle C
4.7	At the time members were being recruited to join the said club, the first defendant and his wife were also majority shareholders of the second defendant holding 80% of its shares and the first defendant was also a director of the second defendant together with his brother Goh Ching Hock. This is evidenced in the offer for sale of membership ('the prospectus') dated 19 September 1996 to prospective members which is at pp 54–113 of Bundle B shows that:	pp 61–62 of Bundle B.
	(i) that the company entered into a lease agreement with Taman Sri Ganda Sdn Bhd (the third defendant) for use of the said club land for a period of 30 years commencing on 1 July 1996 and expiring on 30 June 2026.	pp 100, 109 of Bundle B
	(ii) the said land was charged on 21.06.1996 for banking facilities granted by Arab Malaysian Bank Bhd ('the said bank) to the Lessor. The said charge document is at pp 109–134 of Bundle G.	pp 73, 100 of Bundle B

	(iii) The lessor was described as Taman Sri Ganda Sdn Bhd (the third defendant) and Bougainvillea Country Club Bhd as the lessee and the land as No PT 138865, HSD(KA) 48297, Mukim Hulu Kinta, Daerah Kinta, Negeri Perak.	p 58 of Bundle B
	(iv) Nowhere in the prospectus was it mentioned that the second defendant had also given a debenture to the bank with the power to appoint receivers and managers in the event of default of loan instalments.	
	(v) The said prospectus dated 19 September 1996 was signed by the first defendant as one of the directors under the heading 'Directors Responsibility Statement'	
	(vi) The said prospectus also had a membership application form attached and it was an undisputed fact that this prospectus was given to prospective members and after filling up the form and together with the entrance fee of RM10,000 and security deposit of RM500, the membership agreement was signed later, (the evidence of SP1, SP2, SP3, SP5). Membership agreements of SP1, SP2, SP 3 and SP5 are referred to:	p 113 of Bundle B pp 78–82 of Bundle B
	[95] Rangit Singh (plaintiff) membership agreement	pp 128, 141 (43) Bundle B
	[95] K. Skanthadevan's membership agreement	pp 155–142
	[95] Chen Kim Cheng's membership agreement	pp 127–114
	[95] Rajendran Membership agreement.	pp 169, 156

4.8	The plaintiff and other 79 members he represents, at material times thereafter entered into individual membership agreements with the second defendant (hereinafter referred to as 'the said membership agreements'), and after execution thereof, the second defendant designated the said individuals as members of Bougainvillea Country Club, Ipoh, and the second defendant was described as the proprietor and operator of the said club. The plaintiff and his witnesses testified at trial that they were lured into joining the said club due to the representations made by the first defendant personally or vide his agents, the brochure and the said prospectus as stated above and they joined the said club for the purpose of recreation and relaxation for themselves and their families.	
4.9	Though the membership agreements were entered into at different times between end 1996 and early 1997, the agreement was in standard form as prepared by the second defendant. Evidence was also led by the plaintiff and his witnesses at trial that they signed this agreements after the filling up the offer letter in the prospectus and submitting payment of the entrance fee of RM10,000 and security deposit of RM500. The terms of the membership agreements were, inter alia,	p 18 of Bundle C.
	(i) that by a deed of trust dated 5 September 1996 entered into between the second defendant and Universal Trustee Malaysia Bhd, (hereinafter referred to as the 'said trustees'), the second defendant had appointed the same to act as trustee of the club and that any member would be deemed to be a party to the said deed of trust,	p 131–132 of Bundle B

	(ii) The said membership agreements also stipulated a common term in that, the respective memberships would expire on 26 June 2056 – the members were assured security of tenure.	p 139 of Bundle B
	(iii) the first defendant was described as key promoter of the said club. (it would be submitted later that there is a difference in promoter for a club and company, as the promoter of a club recruits members and does everything necessary to get the club going whereas the promoter of a company is to recruit shareholders)	p 141(23) of Bundle B
	(iii) The members paid RM10,000 as entrance fee and RM500 as security deposit.	p 139 of Bundle B P3
	(iv) Some of the members like the plaintiff's third witness ie Chen Kim Cheng took loans from Maybank Finance	
4.10	Thereafter the second defendant constructed a building on the said land and upon completion thereof, members of the said club commenced usage of its facilities at designated portions of the said building.	
4.11	Prior to commencement of the said club operations, there was a grand opening ceremony at which the Sultan of Perak was invited to attend and he was the patron. The plaintiff and his witnesses testified that at the opening ceremony, the first defendant spoke about the club to the members and that he also promised additional facilities like squash courts, a bowling alley and golf affiliation.	p 18 of Bundle C.

4.12.	The reports by the directors, trustees and auditors of the second defendant for year ended 31 July 2002 showed that the second defendant as of 31 July 2002 had a total of 1,365 registered members and the first defendant signed as one of the directors for the second defendant. The total in the sinking fund was and trust fund shown RM30,902.	pp 19–30 Bundle C At pp 21–22 of Bundle C p 28 of Bundle C.
4.13	The Liaison Committee of the said club of which the plaintiff was member had a series of meetings with the first defendant who was described as Chairman of the second defendant and the first defendant signed the relevant letters on behalf of the second defendant. The plaintiff gave evidence that the Liasion Committee dealt only with the first defendant (Dato Goh Cheng Hong) when it came to matters pertaining to the said club. In fact in the letter dated 28 January 2003, first defendant described himself as founder of the said club, (as he signed the said letter).	pp 31–44 of Bundle C. pp 31, 35, 37, 39 40, 41, 42, 44 of Bundle C. p 40 of Bundle C

4.14	On or about 26. March 2003, due to a default in payment, said bank appointed receivers and managers over the second defendant , being one Mr Mok Yuen Lok and Onn Kien Hoe of Messrs Crowe Horwarth (hereinafter referred to as 'the said receivers and managers'). The letter dated 16 April 2003 addressed to all members is referred to. The receivers were not appointed for the third defendant as the third defendant was not the party which gave the debenture. The third defendant was only the party which charged its land under the third party charge for the loan given to the second defendant – the bank did not foreclose on the said land but appointed receivers as against the second defendant. The second paragraph of the said letter stated that the effect of the appointment of receivers was that the directors of the second defendant had no power to deal with the assets or manage the undertakings of the company. As far as the land was concerned the second defendant was a leaseholder till 2026 ie the lease had another 23 years to run. The receivers could assign the lease if they wanted to but they had no power to sell the land as the landowner and lessor of the said land was the third defendant (Taman Sri Ganda Sdn Bhd) and they were not authorized to deal with the assets of Taman Sri Ganda Sdn Bhd.	p 38 of Bundle B. p 45 of Bundle C
4.15	At all material times thereafter the said members continued to use the said club's facilities though over passage of time, the said facilities deteriorated and/or dwindled as the plaintiff as his witnesses testified to.	

4.16	Even after the appointment of the said receivers the plaintiff and his witnesses testified that the first defendant met them on several occasions and gave them assurances that everything would be okay and the club would be back to normal soon.	
4.17	After the appointment of receivers the first defendant still played a role in liaising with the members and the receivers of the club. The letter dated 29 April 2003 is referred to which shows clearly that the first defendant still played a role in the said club although receivers were appointed. This court is referred to pp 46–47 of Bundle C which clearly show that the first defendant acted for the said club notwithstanding the appointment of receivers.	pp 46–47 of Bundle C
4.18	A letter dated 21 May 2003 signed by the first defendant on behalf of the second defendant and addressed to the Liaison Committee of the said Club is referred to. Another letter dated 2 June 2003 addressed by the first defendant to the receivers is also referred to.	pp 48 of Bundle C pp 49 of Bundle C
4.19	On 6 August 2010, pursuant to and as a result of negotiations between the third defendant acting by the first defendant and the fourth defendant, with the consent of the said bank (and the receivers of the second defendant), the fourth defendant entered into an agreement with the third defendant (hereinafter referred to as 'the said agreement'), to purchase the said land free of encumbrances (being the residue of the lease held by the second defendant being surrendered by the receivers) for RM7.5m.	Bundle D4

	This court is referred to pp 1–2 of Bundle D4 which describe the transaction, in particular para (1), (3), (8) and (9) at p 1 of Bundle D4. This court is referred to cl (10) which states that AM Bank had by a letter of offer agreed to accept RM7.5m as full and final settlement of the debt owing by BCCB (the second defendant) and TSGSB (the third defendant). The said offer letter is mentioned at Appendix 2 (at page 15) but a copy is not annexed. On 22 May 2014 on the last day of trial the plaintiff's counsel requested a copy of the said letter and counsel for the fourth defendant stated that his client would pass it to court and the parties. The said offer letter dated 26 March 2010 was received by the plaintiff's solicitors on 20 June 2014 and the same is annexed to this submission as Appendix A. This court is also referred to cl (11) which stated that then purchaser had inspected the said properties and examined the document of title. The third schedule at pp 11–12 of the sale and purchase agreement mentions the conditions precedent at para 3, of which included:	Appendix A, pp 1–7
	[95] receipt by the purchaser the written confirmation of the receivers to surrender the lease held by the second defendant;	
	[95] receipt by the purchaser the shareholders' approval of second defendant for release of the remainder of the lease by the receivers;	
	[95] the third defendant and the guarantors (of which the first defendant was one of them) consented to acceptance of the AMMB offer.	

	[95] The above conditions were satisfied in that the second defendant's shareholders approved the release of the remainder of the lease by the receivers and the first defendant and the other guarantor consented to the acceptance of the terms of the said AMMB letter.	
4.20	Quite contrary to the evidence given by the first defendant on cross-examination that the sale pp 8 of D4 of the said land was purportedly effected by a power of attorney given to the receivers, p 8 of D4 clearly shows that the first defendant signed on behalf of the third defendant as landowner and the receivers were not parties to the sale.	p 8 of D4
4.21	According to the above sale and purchase agreement the fourth defendant was to pay 10% down payment of 10% RM750,000 and the remainder 90% was to be paid within three months from 6 August 2010.	pp 10 of D4
4.22	The fourth defendant took a loan from the same bank, ie AM Islamic Bank for the remainder 90% as this was the evidence given during cross-examination by the fourth defendant's witness Tan Bee Yong (SD23). Thus it was just an internal transfer, the redemption sum owed by the second defendant was extinguished and a charge on the said land created by AM Islamic Bank (formerly AM Bank) as chargee and the fourth defendant chargor. The fourth defendant is currently the registered owner of the said land on which the clubhouse was situated.	pp 14–16 of Bundle B p 15 of Bundle B
4.23	At the material time the said agreement was executed between the third defendant and fourth defendant on 6 August 2010, the members of the said club were not notified.	

4.24	The said members only became aware of the said agreement vide a letter dated 13 January 2011 from the said receivers and managers informing them, inter alia, that the said land and building, where the said club was situated had been disposed off by the landowner (the third defendant) and that the said receivers were in the midst of uplifting the receivership over the second defendant. The members were asked to contact the directors of the second defendant for further details.	p 178 of Bundle B.
4.25	Vide a letter dated 21 January 2011 addressed to all members of the said club, the fourth defendant, inter alia, informed the same that the fourth defendant had bought over the said land and alleged that legally the said members could no longer use the said club's facilities after 15 February 2011 and further represented that the purchase was only for the land and building but not responsibility over the membership of the said club. It is submitted that the fourth defendant knew that there was a membership club on the land with members but nevertheless went ahead with the purchase.	pp 182–182 A of Bundle B.
4.26	An offer was made by the fourth defendant in the said letter for Bukit Kinding membership to members but the members refused. The plaintiff and his witnesses led evidence that Bukit Kinding was too far away and the facilities were not the same. It was reasonable for the members not to take up the unreasonable offer of membership at Bukit Kinding.	

4.27	The said members thereafter made efforts to contact the first defendant and the directors of the second defendant to ascertain the future of the said club and to ascertain their membership status but such were to no avail. The plaintiff and his witness led evidence to this effect. In fact evidence was led by the plaintiff (as corroborated by his witnesses) that the first defendant could not be contacted at all.	p 40 of Bundle C
4.28	It is indeed intriguing why after the sale, the first defendant was so evasive, especially so when he was the promoter and main person the club members dealt with through their liaison committee and he had described himself as founder of the club (see his letter to the liaison committee dated 28 January 2003) and when he continued to personally liaise with the members after the receivers were appointed as stated above.	
4.29	The plaintiff and his witnesses led evidence that after 15 February 2011, all the members of the said club inclusive of the said members were prohibited by the fourth defendant's the servants and/or agents from entering the said Land where the clubhouse was situated and/or from using any of the recreational facilities at the said clubhouse.	
4.30	The plaintiff vide his solicitors' letter dated 11 March 2011 wrote to the trustee of the said club, Universal Trustee to enquire the amount of funds in the hands of the same, (hereinafter referred to as 'the said trust fund'). Vide a letter dated 8 April 2011 the said Trustee indicated that only RM246.31 was in the trust fund account and RM899.22 for the sinking fund account.	

A B C D E F G H I

4.31	The plaintiff wrote to the Suruhanjaya Syarikat Malaysia ('SSM') on 31 January 2011 about the issue of membership of Bougainvillea Country Club Bhd and the SSM replied on 3 January 2011 stating that the said complaint related to 'Skim Kepentingan' under Part IV Division 5 of the Companies Act and that the matter would be referred to the Seksyen Aduan, Bahagian Penguatkuasaan Ibu Pejbat SSM 'untuk tindakan lanjut.'	p 1 of Bundle B
4.32	The plaintiff's solicitors issued a letter of demand to the second defendant on 11 March 2011 but the same was not replied to by the second defendant.	pp 8–9 of Bundle B
4.33	The plaintiff's solicitors issued a letter of demand to the third defendant on 11 March 2011 but the same was not replied to by the third defendant.	pp 184–187 of Bundle B
4.34	The plaintiff's solicitors issued a letter of demand to the fourth defendant on 11 March 2011 but the same was not replied to by the fourth defendant.	pp 188–190 of Bundle B
4.35	The plaintiff filed this suit on 12 October 2011. The second defendant has been wound up.	

THE PLAINTIFF'S CLAIM

[5] Since the second defendant has been wound up, the plaintiff pursued this representative action against the first, third and fourth defendants. The plaintiff claims that the first defendant was the founder and the promoter of the BCC when there was a drive to recruit members some time in 1996. The first defendant was also the chairman of the second defendant. He had several meetings with prospective members including the plaintiff sometime at the end of 1996 where he gave further details about BCC and the facilities which it was going to offer. The prospective members were given a very attractive brochure and rosy picture of BCC. One of the main signatories of this offer for sale of membership (prospectus) was the first defendant. Those prospective members who were interested in joining BCC were also given an offer for sale of membership dated 16 September 1996. They then signed the form in the offer letter and paid the entrance fee of RM10,000 and security deposit of RM500. A few days later, they entered into agreements which were a standard form agreements with the second defendant. According to all the agreements

the members would have security of membership till June 2056 and the first defendant was described as the key promoter of the club.

[6] The first defendant was the chairman of the second defendant and also the main person in charge of the third defendant at the material time when the offer letter was made. He and his wife, Choong Lee Lan at that material time were the majority and controlling shareholders of the second defendant holding 80% of its shares and was also a director of the second defendant together with his brother Goh Ching Hock. On the other hand, the first defendant and his wife are majority and controlling shareholders of the third defendant holding more than 90% of its shares, and he is a director of the third defendant together with his brother-in-law, Choong Sun Keng. Therefore the plaintiff claims that thelst defendant was at all material time the directing mind and will of the second and third defendant.

[7] The third defendant is the owner of the land which leased it out for the period of 30 years from 1 July 1996 to the second defendant for the BCC's club premises (the said land). Prior to the offer for sale of the BCC's membership, the second defendant granted a debenture deed dated 21 June 1996 which was a fixed and floating charge over all the assets and undertakings of the second defendant to Arab Malaysian Bank now known as Am Islamic Bank Bhd ('the bank') for banking facilities. The bank also took a third party charge over the said land and the directors of the third defendant inclusive of the first defendant gave their personal guarantees. It was never mentioned in the prospectus or in the agreement that the second Defendant had given a debenture to the bank with the power to appoint receivers and managers in the event of default of loan instalments.

[8] On or about 26 March 2003, due to the default in payment of the loan instalments, the bank appointed receiver and manager for the second defendant who intercepted the income of the club. The plaintiff and the other 79 members he represents decided to continue as BCC members when the first defendant who chaired the meeting at the subsequent AGM of the BCC kept on assuring the members that the BCC will continue to function as normal and the receivership would be lifted soon. He told them to be patient and he also promised them that there would be no problems with their memberships in the future. He sounded very convincing and the members believed him. The members could still use the club and its facilities after that, but the number of staff started decreasing as there were lay-offs. Consequently, the service and the facilities at BCC's clubhouse started to deteriorate over the time.

[9] Then on 13 January 2011 the plaintiff and other members received a letter from the receivers and were shocked to find out that the first defendant had caused the third defendant to sell the land on which the BCC's clubhouse

was situated to the fourth defendant with the consent of the leaseholder who was the second defendant. The first defendant never had any meetings with the members of BCC regarding the sale of the land. Liaison committee of BCC was also not informed. The first, second or third defendant did not even write to any of the members about the sale.

[10] Later, vide a letter dated 21 Janury 2011 the fourth defendant wrote to the members, including the plaintiff and other 79 members he represents, to inform them of the sale of the said land and told them that they could no longer use BCC's facilities after 15 February 2011. The plaintiff and other 79 members he represents were further told by the fourth defendant that the purchase was for the land and the building only and not responsible over the memberships of BCC. After 15 February 2011 the plaintiff and other members were prohibited from entering BCC's clubhouse, depriving them from the used of the recreational facilities and the security of tenure of BCC's membership until the year of 2056. As the consequences of the defendants' actions, they suffered losses and damages.

[11] The plaintiff and the other 79 members he represents claimed that the first defendant personally liable for breach of fiduciary duties, tort of conspiracy to injure together with the second and third defendant and tort of inducing breach of contract together with the fourth defendant as he was the person who actively promoted the club to recruit members during the membership drive in 1996. He kept on giving assurances at all the time that the members' security of tenure would be assured till 2056. Furthermore he caused the third defendant to interfere with the membership agreements with the second defendant by selling off the land to the fourth defendant. As the person in charge of the third defendant, his action deprived them of continued use of the BCC's facilities, security of tenure and initial membership fees paid.

[12] The plaintiff further claimed that the first defendant being liable under the remedial of a constructive trust for the plaintiff's losses. The first defendant is liable to account for the benefit that he derived from breaching of his fiduciary duties and acting in conflict of interest in advancing his own interest as a guarantor and the interest of the third defendant as a chargee of the said land when he was released from the liability of RM7.5m as co-guarantor for the loan facilities with the bank. If the land was not sold, he and the other co-guarantor would still be liable jointly and severally for the RM7.5m redemption sum that was offered by the bank. Therefore the first defendant unjustly enriched himself by securing the release of his personal guarantee and the RM7.5m benefit that he received should be apportion between the plaintiff and the other 79 members that he represents.

[13] The third defendant as the owner of the land knew through the first

defendant that the members had an existing contract with second defendant but the first defendant as the main person in charge of the third defendant sold off the land and building where BBC's clubhouse situated to the fourth defendant. He knew about the membership agreements with the second defendant but nonetheless the third defendant interfered with the membership agreements by selling off the land and therefore causing breach of membership contract between the plaintiff and the second defendant. The plaintiff and the other 79 members he represents wanted to be compensated for the losses they have suffered and also the damages for the loss of membership and deprivation of the continuing use of the BCC's facilities against the third defendant.

[14] Finally, the fourth defendant committed the tort of inducing breach of contract as they knew about the membership agreement between the plaintiff and the second defendant but nevertheless recklessly went ahead with the purchase of the land where the BCC's clubhouse stood and cause loss of security of tenure till 2056 to its member and also the loss of use of the BCC's facilities. The plaintiff and the other 79 members he represents wanted to be compensated for the loss they have suffered and also the damages for the loss of membership and deprivation of continued use of the BCC's facilities against the fourth defendant.

DEFENDANTS DEFENCE

[15] The first and third defendants deny vehemently that they could have intended, participate, committed or acted against the interest of the plaintiff and other members in the manner described by the plaintiff. They were restricted, curtailed and prevented to act due to the present of the directing mind and will of the bank through the appointment of the receiver and manager who took over the affairs of the second defendant and to act according to power granted under the Deed of Debenture including the powers to deal with the land in which BCC's clubhouse is situated. The first defendant denies that he is the directing mind and wills of the third defendant. He only carried out his duties and responsibilities within the powers of an officer or director of the third defendant. He denies ever acting in his personal capacity and since companies operate the establish principle of limited liability, the officer or the director should not be held personally liable for the act done by the companies. The first defendant further denies that he was the BCC's promoter when there was a promotion drive to recruit members sometime in 1996.

[16] The fourth defendant avers that it executed the sale and purchase agreement to buy the said land where the BCC's clubhouse is situated as a bona fide purchaser, without notice of the dispute between the plaintiffs and the other defendants, free from all encumbrances and charges and with the consideration of RM7.5m. At all material time the fourth defendant has carry

out all the obligations under the said agreement and it had a good clean title of the said land. The fourth defendant denied any obligation or duty of care towards the plaintiffs since there is no privity of contract between them. Therefore all notices regarding the said land given to the plaintiffs are valid and the fourth defendant is not liable in whatsoever manner to any loss or damage suffered by the plaintiffs.

ISSUES

[17] A list of 13 issues to be tried proposed by the plaintiff was tendered and marked as Bundle F. However, the main issues to be dealt with can be summarised as follows:

(i) whether the first defendant was at all material times:

(a) the directing mind and will of the second defendant and the third defendant; and/or

(b) the promoter of BCC in recruiting members.

If (b) above is answered in the affirmative, whether the first defendant personally owed a fiduciary duty and/or as a constructive trustee to the plaintiff and the other 79 members he represents and whether the first defendant has breach his fiduciary duty and/or constructive trust and is liable for their losses.

(ii) whether the first and third (including second) defendants are liable for the tort of conspiracy to injure which cause economic loss to the plaintiff and the other 79 members he represents.

(iii) whether the third defendant (acting by the first defendant as its directing mind and will), in entering into the agreement dated 6 August 2010 to sell of the said land to the fourth defendant, induced a breach of the membership agreements between the second defendant and the plaintiff and the other 79 members he represents.

(iv) whether the fourth defendant, knowing or being aware that the second defendant operated BCC with members, in entering into the agreement dated 6 August 2010 to purchase the said land from the third defendant induced a breach of the said membership agreements by the second defendant.

Analysis and findings

[18] It is trite that as a decider of facts, I have to evaluate and judicially appreciate all evidence adduced before the court for the purpose of discovering where the truth lies in a particular case. I am always reminded myself to a quotation from the judgement of Gopal Sri Ram JCA (as he then was) in the

case of *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62 at p 77:

> It is trite that, apart from applying the standard of proof required by law, a trier of fact, in order to arrive at a decision according to law, must judicially appreciate the evidence led before him upon the issue called for resolution. A decision arrived in the absence of a judicial appreciation of evidence is liable to appellate correction. Judicial appreciation is concerned with the process of evaluating the evidence for the purpose of discovering where the truth lies in a particular case. It includes, but is not limited to, identifying the nature and quality of the evidence, assigning such weight to it as the trier of fact deems appropriate, testing the credibility of oral evidence against contemporaneous documents as well as the probabilities of the case and assessing the demeanour of witnesses.

Therefore as a trier of facts, I have to judicially appreciate all evidence adduced before me and address the issue called for resolution accordingly. With this basic duty in mind, I now return to the case at hand and examine all relevant evidence led by both parties.

First issue first limb–Whether the first defendant was at all material times the directing mind and will of the second defendant and the third defendant

[19] The plaintiff's counsel submitted that the documentary evidence as well as the evidence led by the plaintiff and his witnesses as well as evidence elicited in cross-examination clearly shows that in fact and in law the first defendant was the directing mind and will of the second and the third defendant. On the other hand, the first and third defendants' counsel submitted that the first defendant was at all material time carrying out his duties and responsibilities within the confines and powers of an officer or director of the second and third defendant. The first defendant should not be held liable for the act done in that capacities. He further submitted that the plaintiff also at all material time knew about the appointment of the receiver and manager who had the direct control over all assets of second defendant under the debenture deed, charge documents and the power of attorney created in favour of the bank. Therefore the first defendant cannot be the directing mind and will of the second and the third defendant.

[20] The basic principle on the separate legal entity of a company or the veil of incorporation had been long time decided in the case of *Aron Salomon (Pauper) v A Salomon & Co Ltd* [1897] AC 22, where the House of Lords confirmed the principle that a company is a legal entity separate from its shareholders and its members. In the case of *Abdul Aziz bin Atan & 87 Ors v Ladang Rengo Malay Estate Sdn Bhd* [1985] 2 MLJ 165 Shankar J held that:

> It is trite law that an incorporated company is a legal person separate and distinct from the shareholders of the company. The company from the date of incorporation

A has perpetual succession and the Companies Act provides that the liability on the part of the shareholders to contribute to the assets of the company will be limited in the manner provided by law and its memorandum and articles of association. The whole point of forming a limited company is that the shareholders can have in their hands the management of the business without incurring the risk of being under unlimited liability for the debts of the company.

B

In the case of *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533 Chong Siew Fai CJ held that:

C We are in complete agreement with basic principle of fundamental attribute of corporate personality, ie that the corporation is a legal entity distinct from its member, be they individuals or corporate bodies – a principle firmly established since *Aron Solomon v A Solomon & Co Ltd* [1897] AC 22.

D **[21]** However, there are situations where the veil of incorporation had been lifted by the court, particularly for the purpose of giving justice. In *Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97 the Supreme Court held that:

E ... the court could generally lift the corporate veil in order to do justice particularly where an element of fraud is involved. There was admittedly an element of fraud in the receipt of secret profits alleged in this case and this was sufficient for the court to lift e corporate veil for the purpose of determining whether the assets of the company were really owned by them ...

F In *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109, Salleh Abas FJ (as he then was) held that:

The court seems quite willing to lift 'the veil of incorporation' (so the expression goes) when the justice of the case so demands.

G

Meanwhile in the case of *Law Kam Loy and Anor v Boltex Sdn Bhd and Ors* [2005] MLJU 225; [2005] 3 CLJ 355 Gopal Sri Ram JCA (as he then was) held that:

H In my judgment, in the light of the more recent authorities such as *Adams v Cape Industries Plc* [1990] Ch 433, it is not open to the courts to disregard the corporate veil purely on the ground that it is in the interests of justice to do so. It is also my respectful view that the special circumstances to which Lord Keith referred include cases where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity.

I

The recent case referred to by the plaintiff's counsel is the case of *Prest v Petrodel Resources Ltd and others* [2013] 3 WLR 1, where the House of Lords held that:

... I conclude that there is a limited principle of English Law which applies when a

person is under an existing obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality...

[22] It is trite law that even though a company upon registration assume its own legal entity, it cannot run by itself. In the case of *Bank Bumiputra (M) Bhd & Anor v Lorraine Esme Osman & Aspatra Sdn Bhd & Ors* [1985] 1 CLJ 552 Zakaria Yatim J referred to *Lennards's Carrying Company Ltd v Asiatic Petroleum Company Ltd* [1915] AC 705 where Viscount Haldane LC, in his judgment at p 718 said:

My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the share-holders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that person has an authority co-ordinate with the board of directors given to him under the articles of association and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company ...

The Federal Court in the case of *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105, Wan Suleiman FJ held as follows:

We were referred to a number of cases, of which the most significant, in this respect, is *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 172.

A company, he says may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as condition of liability in tort, the fault of the manager will be the personal fault of the company.

Based on the authorities cited above, I am of the opinion that the court may under special circumstances consider to look behind the corporate veil to determine and to decide on the liability of those who are responsible as the decision maker of a company or 'who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation'.

[23] From the evidence adduced, the first defendant and his wife were majority shareholders of the second defendant holding 80% of its shares and the first defendant was also a director of the second defendant together with his brother Goh Ching Hock when the bank gave banking facilities to the second defendant and the second defendant granted a debenture deed dated 21 June 1996 in favour of the bank. On the other hand, the first defendant and his wife are majority and controlling shareholders of the third defendant holding more than 90% of its shares, and the first defendant is a director of the third defendant together with his brother-in-law, Choong Sun Keng when third defendant gave third party charge of the said land to the bank for the banking facilities granted to the second defendant. The same proportion of shares owned by the first defendant and his wife when the second defendant made the offer for the sale of BCC's memberships to public in 1996 and when the third defendant decided to sell off the said land to the fourth defendant in 2010.

[24] It is also submitted that the first defendant's wife, brother and brother in law are associated persons with the first defendant in respect of the shareholding in the second and third defendants, within the definition of s 6A of the Companies Act 1965. For easy reference, the said relevant provisions are as below:

> Section 6A. Interests in shares.
>
> (4) A person shall be deemed to have an interest in a share where a body corporate has an interest in a share and–
>
> (a) the body corporate is, or its directors are accustomed, or is under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of that person in relation to that share;
>
> (b) that person has a controlling interest in the body corporate; or
>
> (c) that person, or the associates of that person or that person and his associates are entitled to exercise or control the exercise of not less than fifteen per centum of the votes attached to the voting shares in the body corporate.
>
> (5) For the purposes of paragraph (4)(c), a person is an associate of another person if the first-mentioned person is -
>
> a ... ;
>
> b a person in accordance with whose directions, instructions or wishes that other person is accustomed or is under an obligation, whether formal or informal, to act in relation to the share referred to in subsection (4);
>
> c a person who is accustomed or is under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of that other person in relation to that share;
>
> d a body corporate which is, or the directors of which are, accustomed or

> under an obligation whether formal or informal, to act in accordance with the directions, instructions or wishes of that other person in relation to that share; or ...

Based on the facts, established from the evidence given by the witnesses and contemporaneous documents tendered and also the law mentioned above, it is my considered view that the first defendant can be considered as the directing mind and will of the second and third defendant during the period when the second or third defendant made the major business decision regarding the bank loan, including the granting of the debenture and creation of the lease on the said land, second defendant made the offer for the sale of BCC's memberships in 1996 and when third defendant decided to sell off the said land to the fourth defendant in 2010.

First issue second limb–Whether the first defendant was at all material time the promoter of BCC in recruiting members

[25] The plaintiff claimed that the first defendant was the directing mind and will of the second defendant at the time membership was offered to the public. He was designated as key promoter of BCC. He was the Chairman of the second defendant, the founder of BCC and also acted on behalf of the BCC in relation to the Liaison committee of BCC even after the receivers were appointed for the second defendant. Thus he played a tripartite role, a person controlling the second defendant at the time members were being recruited, the founder and promoter of BCC and representative of the second defendant in relation to the liaison committee of BCC. The first defendant denied the claim and argued that the so called drive that was purportedly engineered by the first defendant was never proven to have taken place. The plaintiff and other members had voluntarily went to the first defendant's office and the first defendant in holding any discussion, answering any queries and shedding any light on BCC owned by second defendant must have done so as the director and officer of second defendant, who was acting on behalf of the second defendant and cannot be held personally liable for those acts.

[26] The plaintiff and his other witnesses in their evidence pointed out that the first defendant was the promoter of BCC when there was a promotion drive by second defendant to recruit members some time in 1996. They also confirmed that first defendant as the second defendant's chairman had several meetings with prospective members where he gave further details about BCC and the facilities which it was going to offer. He gave prospective members a rosy picture and an attractive brochure of BCC. The plaintiff and the other 79 members he represents joined the said club because of the representations made by first defendant, a promoter of BCC.

[27] Contrarily, the first defendant argued that the evidence by the plaintiff and which was subsequently parroted by his other witnesses has no basis and unsupported altogether. The testimonies were not supported by any documents, uncorroborated and a blatant lie. With greatest respect, I cannot agree with the first defendant's arguments. The plaintiff's evidence was corroborated with contemporaneous documents. Brochure with pictures of BCC was tendered in Bundle C at pp 1–17 and the prospectus of BCC was tendered at pp 54–113, Bundle B. Besides that, the most important piece of document which the first defendant cannot deny is the membership agreement tendered at p 141, Bundle B. Paragraph 10.2 at p 141 (23), Bundle B clearly stated that:

> 10.2 Goh Cheng Hong being the key promoter of the Club shall be entitle as of right to be a Life Member and at any time at his sole discretion to select another Fifteen (15) individuals to be the Life Members of the Club.

The contemporaneous document clearly describe first defendant as key promoter of BCC. According to s 91 Evidence Act 1950, a written agreement is a solid proof of its content and no evidence shall be given to disproof of the terms of the agreement. I am of the opinion that the first defendant cannot run away from the fact that he was the key promoter of BCC when the second defendant goes on the promotion drive to recruit members in 1996.

[28] It is trite that a promoter of a club owes fiduciary duties to the members. Gopal Sri Ram JCA (as he then was) in the case of *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and Other Appeals* [1996] 2 MLJ 265 in his judgement had observed that:

> A review of the authorities reveals that the characteristics referred to by Wilson J are present in the well-established categories of relationships in which the duty has been held to arise. These include the relationships of spiritual adviser and penitent, doctor and patient, agent and principal, solicitor and client, company directors, partners and joint venturers. It is noteworthy that the fiduciary doctrine has even been extended to those in negotiation for a partnership or a joint venture. The concatenation of cases in which these relationships have been dealt with may be found in any standard textbook upon the subject, and for that reason we find it unnecessary to refer to all of them in this judgment.
>
> Ought the doctrine to be made applicable to promoters of proprietary clubs? The appellants say it ought not. The judge held that it ought. With respect, we agree with the judge. In arriving at his conclusion, the learned judge was undoubtedly influenced by the decision of the *House of Lords in Erlanger v The New Sombrero Phosphate Co* (1878) AC 1218. In fact, he quoted extensively from the speeches delivered in that case so that it becomes unnecessary for us to enter upon a discussion of the case. Suffice to say that we find the reliance he placed upon *Erlanger* to hold that the appellants, as promoters, were fiduciaries to be a correct

direction in law and to be entirely in keeping with the spirit and intendment of equity jurisprudence. A

Therefore the first defendant who was the directing mind and will of the second and third defendant had to be more careful when dealing with or making any business decision for second or third defendant which will finally involve the interest of the members of BCC. The first defendant will be held personally liable to any damage suffered by the members of BCC if he breaches his fiduciary duty as a promoter and this, I think will include any business decision made by the first defendant that can affect the interest of the members of BCC. B

Second issue–Whether the first and third (including second) defendants are liable for the tort of conspiracy to injure which cause economic loss to the plaintiff and the other 79 members he represents. C

[29] Plaintiff's counsel submitted that the third defendant was party to the arrangement as the third defendant was the vendor of the land under the sale and purchase agreement dated 6 August 2010. The first and second defendant facilitated the said sale by complying with the conditions precedent under the said sale and purchase agreement and it was pursuant to that arrangements the completion of the sale occurred to the fourth defendant. The first, second and third defendants concealed the execution of the sale and purchase agreement and the contents of the agreement which contained the conditions precedent which the first and second defendant had to comply with form the plaintiff and the 79 other members he represents. The first defendant, who was the directing mind and will of the second and third defendant, concealed the said negotiations and quite apart from breaching his fiduciary duties, acting in conflict of interest when he benefitted himself in escaping liability as a guarantor. In doing so, he knew that the said sale would injure the economic interests of the plaintiff and the 79 other members he represents. There is a strong circumstantial evidence to show that there was a conspiracy. The defendant otherwise argued that the plaintiff and all members of BCC fully aware that the second defendant had come under the full control of the receiver and manager as early as 26 March 2003. The first and third defendant were powerless and could do nothing in all matters dealing with the assets. It is the receivers who directed the third defendant to execute the sale and purchase agreement with fourth defendant. The first defendant being the director of the third defendant had to accede to the wishes of the receivers. The first defendant also argued that the interests and rights of all BCC members were under the supervision and care of the trustee appointed by statutory requirement and as such it is unlikely and impossible for the first and third defendants to engage in a tort of conspiracy to injure BCC's members. D E F G H I

[30] Upon perusing the evidence adduced, I agree with the plaintiff counsel's submission that the said land on which the BCC clubhouse stood was not the property of the second defendant. It belongs to the third defendant and

was only leased to the second defendant. The only power that the receivers under the debenture would have is to surrender the lease or to assign the remainder of the lease or to sell the building and the other movable assets of the second defendant on the said land. The said land was the immovable asset of the third defendant, which had the sole power to deal with the land subject to the release of the remainder of the lease by the second defendant or the receivers appointed with the approval of the shareholders of the third defendant. Thus the fourth defendant could only deal with the third defendant if they are interested to purchase the said land, which is contrary to the evidence of the first defendant that the sale was purportedly by the receivers.

[31] Besides that, evidence also shows that the offer letter by the bank which was referred to at p 7 of Appendix A of the plaintiff's counsel submission, signed by the third defendant represented by the first defendant who was also one of the guarantors. Pursuant to and as a result of the negotiations between the third defendant and the fourth defendant, with the consent of the bank and the receivers of the second defendant, the fourth defendant entered into an agreement with the third defendant to purchase the said land free of encumbrances when the residue of the lease held by the second defendant being surrendered by the receivers for RM7.5m. Thus there was an agreement by all three parties, the first, third and as well as the second defendant in giving consent to the sale of the said land. Ironically, all these negotiations and dealing were kept secret to the members of BCC. None of BCC's members knew about the sale of the said land where their clubhouse stood. The first defendant as the directing mind and will of the second and third defendants and owing fiduciary duties to BCC's members never had any meetings with the members of the club regarding the sale of the land. Liaison committee of BCC was also not informed. The first, second or third defendant did not even write to any of the members to notify them about the sale.

[32] Based on what was transpired, I am of the opinion that the first, second and third defendants are the interested parties in the dealing of the said land and they just ignored the interest of BCC members.

They are so reckless and acted as the members do not exist. They simply put BCC members' interest behind in making their business decisions that enriched them to the detriment of BCC members. They benefited themselves in escaping liability as borrower or guarantor. In short, I agree that they conspired to injure BCC members including the plaintiff and 79 other members he represents. Section 10 of the Evidence Act 1950 provides that:

> Section 10. Things said or done by conspirator in reference to common design.
>
> Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said,

> done or written by any one of those persons, in reference to their common intention after the time when the intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

The authorities referred to, I think, showed that the direct evidence of an intention to injure was not required under the law. It was sufficient if there was evidence from which conspiracy could be inferred. In the case of *Ong & Co Pte Ltd v Quah Kay Tee* [1996] 2 SLR 553 it was held that:

> On the facts, the plaintiff had adduced sufficient evidence from which an inference of conspiracy or fraud could be drawn.

Similarly, in the case of *R Balakrishna Pillai v State* (1996) CRi LJ 757, the Kerala High Court held that:

> ... The essence of the conspiracy being bare agreement between the conspirators, the same has to be proved in the manner allowed by law. While accepting the materials that may be let in to prove the case of conspiracy the reality of the situation has to be taken into account. Conspiracy as a whole is brought about in secrecy and the proof of the same, by adoption of evidence direct; is really an impossible feat in most of the cases, though in the rarest of rare occasion; the possibility of obtaining such evidence is there. As such the conspiracy may be proved in most of the cases, by process of inference or induction from relevant facts and circumstances.

[33] From the evidence or the relevant facts adduced, I am of the opinion that it is safe to infer that the first, second and third defendant conspired to injure the BCC members when they secretly deal with the said land and the backlash of the dealing would directly involve the interest of BCC members. They were deprived of their membership benefits and privileges. On top of it, they lost the RM10,000 entrance fee and RM500 security, they could not sell their membership to third parties which the rules of the Club allowed, they lost security of tenure of membership till June 2056 and obviously they could not gain access to the clubhouse to enjoy the facilities provided as before. Therefore it is just and equitable to find that the first, second and third defendant to be held liable to compensate the plaintiff and 79 other members he represents for their losses under the tort of conspiracy to injure.

Third issue - Whether the third defendant (acting by the first defendant as its directing mind and will), in entering into the agreement dated 6 August 2010 to sell of the said land to the fourth defendant induced a breach of the membership agreements between the second defendant and the plaintiff and the other 79 members he represents.

[34] The third and fourth issues can be dealt together. The fourth issue is whether the fourth defendant, knowing or being aware that the second defendant operated BCC with members, in entering into the agreement dated 6 August 2010 to purchase of the said land from the third defendant induced a breach of the said membership agreements by the second defendant.

[35] The plaintiff argued that the first defendant knew of the membership agreements as he was the founder and the promoter of BCC. The first defendant's knowledge of the membership agreements can be imputed to the third defendant since he was the director and the first defendant practically controlled all the shareholding of the third defendant through himself and his associates, being his wife, his brother and brother-in-law. He was in fact and in law the directing mind and will of the third defendant, the vendor of the said land. In fact the sale and purchase agreement of the third defendant with the fourth defendant was executed by the first defendant on behalf of the third defendant. For the fourth defendant, the evidence adduced showed that the fourth defendant also knew about the existence of BCC members at the time of execution of the sale and purchase agreement right up to the date of completion. In fact the letter dated 21 January 2011 from the fourth defendant to all BCC members implies that all along, the fourth defendant knew that the said land had a clubhouse with members using the facilities. The first, third and fourth defendant knew that the sale and purchase agreement entered to sell off the said land would cause the second defendant to breach the membership agreements with BCC members. Therefore they are liable under the tort of inducement of breach of contract. The defendants vehemently denied the allegation and repeated the same tune of defence when they keep on blaming the receivers as the main person behind the dealing of the said land. They argued that the plaintiff and his witnesses ought to know of the presence and the role of the receivers but choose to make such sweeping, unwarranted and unsubstantiated statement against the first and third defendants just to bolster their claim.

[36] The law on inducing breach of contract had been discussed in the case of *Fong Seng Fatt dan satu lagi lwn Syarikat Cekal Kasih Sdn Bhd* [2011] 4 MLJ 27 where the Court of Appeal had observed that:

> [12] Liabiliti kerana mendorong kemungkiran kontrak telah diasaskan dalam kes *Lumley v Gye* (1853) 118 ER 749. Pada asasnya tort ini melibatkan tiga pihak di

mana pihak ketiga telah mendorong pihak-pihak yang berkontrak untuk memungkiri kontrak tersebut...

[13] Prinsip undang-undang yang diasaskan dalam *Lumley v Gye*, telah diperluaskan skopnya dalam kes *DC Thomson & Co Ld v Deakin and Others* [1952] Ch 646, di mana Morris LJ berkata, di ms 702:

> ... The tort is committed if a person without justification knowingly and intentionally interferes with a contract between two other persons. There must, therefore, be knowledge of the existence of contractual relations between others and the intentional commission, without justification, of some act which interferes with those contractual relations so as to bring about or procure or induce a breach resulting in damage ...

Jika diperhatikan dalam kes ini penekanan telah diberikan kepada elemen niat (intention) bagi menggantikan ungakapan 'maliciously' yang digunakan dalam kes *Lumley v Gye*.

[14] Di bawah tort ini defendan akan hanya bertanggungan jika terbukti pihak-pihak yang berkontrak telah memungkiri kontrak mereka secara tidak sah. Prinsip ini telah dijelaskan oleh Lord Hoffman dalam kes *OBG Ltd and another v Allan and others* [2007] 4 All ER 545 di mana beliau berkata, di ms 557:

> The forms of action no longer trouble us. But the important point to bear in mind about *Lumley v Gye* is that the person procuring the breach of contract was held liable as accessory to the liability of the contracting party. Liability depended upon the contracting party having committed an actionable wrong. Wightman J made it clear when he said (1853) 2 E & B 216 at 238, 118 ER 749 at 757): It was undoubtedly prima facie an unlawful act on the part of Miss Wagner to break her contract, and therefore tortious act of the defendant maliciously to procure her to do so ...

[15] Dalam *Greig v Insole* [1978] 1 WLR 302 Slade J (beliau pada masa itu) telah merumuskan lima elemen penting bagi tort ini yang telah diterimapakai oleh Wan Sulaiman FJ ketika menyampaikan keputusan Mahkamah Persekutuan dalam *Loh Holdings Sdn Bhd v Penglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105. Kelima-lima elemen tersebut yang perlu dibuktikan untuk berjaya dalam tort ini bolehlah diringkaskan seperti berikut:

(a) terdapatnya campur tangan oleh defendan, sama ada secara langsung atau secara tak langsung (jika disertai dengan cara yang menyalahi undang-undang);

(b) defendan mestilah mempunyai pengetahuan tentang kewujudan kontrak tersebut;

(c) defendan mestilah mempunyai niat untuk melakukan kemungkiran kontrak tersebut atau campur tangan di dalamnya;

(d) campur tangan defendan itu telah menyebabkan plaintif mengalami kerugian; dan

(e) tiada justifikasi dalam tindakan defendan untuk campur tangan sedemikian.

[37] The question needed to be addressed is that, whether the plaintiff succeeded in proving the five elements against the defendants. Analysing the evidence given and from the facts established, I am of the opinion that the plaintiff had succeeded to prove that the first, third and fourth defendant did interfere with the membership agreements entered between the plaintiff and 79 other members he represents and the second defendant. The evidence clearly shows that the first defendant as the directing mind and will of the third defendant accepted the redemption sum of RM7.5m offered by the bank and thereafter negotiated the sale of the said land with the fourth defendant. They benefited themselves in escaping liability as borrower or guarantor at the expense of BBC's members. The fourth defendant who knew the existence of BCC membership agreements agree to purchase the said land at the same price of RM7.5m. The defendants' defence of the involvement of receiver and manager in the sale of the said land cannot stand. I agree that the receivers' role was only to deal with the assets of the second defendant. The second defendant only held a 30 year lease to the said land and the only thing the receivers could do was to surrender the remainder of the unexpired lease subject to the approval of the second defendant's shareholders. In fact, in the Bundle D4, the fourth defendant's own bundle clearly shows that the sale and purchase agreement was between third defendant as the vendor and the fourth defendant as a purchaser.

[38] Therefore, I concluded that the first, third and fourth defendant did directly interfered with the membership agreements between the second defendant and BCCs members. They knew about the said agreements but they gave priority in protecting their interest and were careless about the damages or losses suffered by BCCs members. The intention to interfere with the memberships' agreements can be infer from the defendants' action. As the consequences of the breach, the plaintiff and the other 79 members he represents were deprived from using the facilities at BCC's clubhouse, lost the security of tenure of BCC's membership and loss of initial membership fees and deposit paid.

DECISION

[39] Based on the foregoing, I am satisfied that the plaintiff has satisfactorily proved its case on a balance of probabilities against the defendants. I therefore allow the plaintiff's claim as follows: Damages

(a) The first, third and fourth defendant were jointly or severally liable to pay RM10,500 each to the plaintiff and the other 79 members he represents for the loss of the initial membership fees and the deposit paid. Since the

plaintiff and the other 79 members he represents were given back their initial membership fees and deposit paid, they are no longer eligible to claim the loss of use of the club facilities.

(b) The first defendant was the main person behind the existence and the downfall of BCC. He is the founder and the promoter of BCC, and he was the directing mind and will of the second and third defendants. He owes fiduciary duties to BCC members. He breached the said duties and also acting in conflict of interest in his actions. Therefore I allowed the plaintiff's claim for the exemplary damages against the first defendant and he shall be personally liable to pay RM10,000 each to the plaintiff and the other 79 members he represents. The damages awarded were just an exemplary, nothing to compare to actual loss suffered by the plaintiff and the other 79 members he represents.

COST

[40] I also allowed the cost of RM80,000 to be paid to the plaintiff. From the amount, the first defendant is liable to pay RM30,000 and the third and fourth defendants liable to pay RM25,000 each.

Order accordingly.

Reported by Ashok Kumar